

Proc II

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

10,318

FILE: B-192763

DATE: May 31, 1979

MATTER OF: Portfolio Associates, Inc.

[Protest Alleging Unfair Evaluation of Proposal]

DIGEST:

1. Allegation that agency discriminated against protester on the basis of stereotypes of minorities and women held by agency personnel is not supported by record.
2. Consideration of ability of protester's personnel to establish working relationship with agency personnel in evaluation of proposal was not improper, since such ability is reflective of area which can be considered under announced criterion.
3. Record which does not indicate what occurred during oral negotiation session, but reflects only disagreement between protester and agency as to meaningfulness of what occurred, does not provide basis for conclusion that meaningful negotiations were not conducted with protester, particularly where agency regulation does not require discussion of deficiencies which cannot be corrected without major changes to proposal and it appears at least some deficiencies were of that nature.
4. Fact that two of five agency officials present at GAO bid protest conference declined to join in oral discussion of issues is not objectionable, since conference is not intended to be formal hearing.

DLC 01681

Portfolio Associates, Inc. (Portfolio), protests the Department of Housing and Urban Development's (HUD) proposed award of a contract to another firm on the ground that its proposal, to develop audio/visual (A/V) aids to be used in the orientation of HUD staff, private contractors, and temporary employees at disaster field offices pro-AGC 00023

005445

(DFO), was unfairly evaluated by HUD. In addition, Portfolio seeks reimbursement for its proposal preparation costs and protest expenses. We are denying the protest because the record fails to disclose any improper agency action which would warrant sustaining the protest. Consequently Portfolio's claim for proposal preparation costs and protest expenses is also denied.

Portfolio believes it was denied the award because of the stereotyped views of HUD personnel regarding minorities and women (Portfolio's president is a black woman); that HUD relied on an evaluation criterion during its review of Portfolio's proposal that was not specified in the solicitation; and that HUD improperly failed to indicate to Portfolio the nature of the perceived weaknesses in its proposal during oral negotiations.

Portfolio's contention that it was prejudiced by HUD's stereotyped views of minorities and women evolved out of a conversation between the contracting officer and Portfolio's president which was initiated by the latter after Portfolio learned of HUD's intent to make award to another firm. According to Portfolio, the contracting officer told Portfolio's president that the chairman of the technical evaluation panel (TEP) had told him Portfolio's president was overly aggressive and inflexible during the oral negotiations and that were an award made to Portfolio the president would prove hard to work with. (According to Portfolio this information was conveyed by the contracting officer so that the president could alter her approach in the future.) Portfolio suggests that this conclusion has no factual basis and can only reflect a stereotyped view of black women.

It is eminently clear from the record that the personality of Portfolio's president had little bearing on the non-selection of Portfolio for award. The record shows that Portfolio was the lowest-scored offeror of the six firms in the competitive range, with the evaluators expressing significant concern over the value of Portfolio's disaster experience, its non-orientation toward A/V presentations, and its proposed use of personnel who would devote less than full time to the project. Following oral negotiations and submission of best and final offers,

Portfolio was downgraded further, with the evaluators reporting that the firm was "overconfident * * *, extremely aggressive, and unreceptive to HUD suggestions or ideas. They would be difficult to work with closely in the field." Subsequently, in response to Portfolio's inquiries of the contracting officer, the TEP chairman prepared a memo outlining the evaluators' concerns regarding the Portfolio proposal. The following is an extract from that memo:

"The firm's oral presentation raised more questions and doubts than it answered, but it did provide the following answers. The firm would not commit any personnel more than half time (per * * * [Portfolio's president]). A detailed method or approach to training evaluation was not developed. As the panel correctly anticipated, only * * * [Portfolio's consultant] knew anything about disasters or emergency housing. Unfortunately his experience was out of date (hurricane 'Agnes' vintage) and he was reluctant to listen to HUD suggestions or ideas. The over confident, aggressive, often abrasive attitude of Portfolio convinced the panel that the firm did not clearly understand the program objectives especially the close coordination and working relationship that must be established with field personnel. Their approach definitely would not develop a good relationship.

"The final panel scoring reflected their negative feelings as four of the five members reduced their scores a total of 103 points primarily in the 'understanding and approach' category."

We find this evaluation record reflective not of racial or sexual stereotyping, but rather of legitimate evaluator concerns regarding the protester's demonstrated ability to understand and perform the required work. We also note that a similar concern about ability to work in the field was expressed with respect to another firm. Even if it is assumed, however, that the evaluators' concern with

Portfolio's aggressiveness was inappropriate, it is clear that the evaluators had other valid concerns which, in view of the competition, would have led to the selection of another offeror in any event. Consequently, we feel that Portfolio did not suffer any meaningful prejudice in this procurement because of its "aggressiveness."

Portfolio further contends that HUD's concern with the ability of contractor personnel to establish a working relationship with agency personnel constituted an unannounced evaluation factor. We do not agree.

The solicitation identified four technical evaluation factors. In descending order of importance, they are:

- A. Demonstrated Understanding of the Program Objectives, Tasks to be Performed and Probable Effectiveness of Proposer's Approach
- B. Organizational Qualifications
- C. Key Personnel
- D. Organizational and Management Plan

The RFP Statement of Work required a certain amount of field work by the contractor, during which significant contact with HUD field personnel would be required. Consequently, we think the evaluators could reasonably take into account how well that field work would be accomplished by considering the contractor's ability to work with HUD personnel. Such consideration did not give rise to an unannounced evaluation factor -- it merely reflected one of many areas that could validly be considered under the first announced criterion. See, e.g., Analytic Systems, Incorporated, B-179259, February 14, 1974, 74-1 CPD 71; Interactive Sciences Corporation, B-192807, February 23, 1979, 79-1 CPD 128.

We note, however, that under the announced criterion, the evaluation was to be based on the offeror's written proposal, with understanding to be "reflected by the

and completeness of the discussion of the tasks to be performed" and effectiveness to be measured by the "Definition of approach * * * to achieve program objectives." The record shows that much of the agency's concern with Portfolio's understanding of the requirements and its proposed approach for meeting them stemmed from the proposed use of a particular consultant, whose experience was not highly regarded by the evaluators for this procurement. The record is not so clear, however, as to whether the reduction of Portfolio's score in the understanding and effectiveness category which resulted from the perceived difficulties of working with the firm reflects something that was in the Portfolio proposal or reflects the evaluators' negative reaction to the personality of the consultant. If the lower score did result solely from such a reaction, we would view the TEP's approach as inconsistent with the stated criteria. However, since as indicated above it is clear that there were other serious deficiencies in the Portfolio proposal, so that even if that firm's score had not been reduced at all after the oral presentation the firm still would not be in line for award and therefore again cannot be said to have suffered any prejudice from this possible procurement deficiency.

Portfolio's final contention centers upon HUD's alleged failure to advise Portfolio of the specific nature of the perceived deficiencies in its proposal.

The TEP's initial proposal evaluation found Portfolio to be weak under the most important evaluation criterion, Demonstrated Understanding of the Program Objectives, Tasks to be Performed and Probable Effectiveness of Proposer's Approach, principally because of the proposed consultant. Other weaknesses involved the "training evaluation capabilities of the staff," the lack of either facilities or a named subcontractor for the preparation of A/V presentations, and the absence of any proposed full-time personnel. Portfolio asserts that during the oral negotiation session:

"There were no references to specific sections, pages, ideas, staffing, hours, or cost presented in our proposal. Rather, what

happened is that we discussed issues raised by Portfolio * * *. The * * * (TEP) did not point out any portions of our proposal that contained ambiguities, uncertainties or deficiencies.

* * * * *

"The last statement made to the TEP by Portfolio was that since there were no substantive questions or issues raised about our proposal, the only revision we would make would be in the cost.

* * * * *

"There were no series of questions asked by the panel." (Emphasis in original.)

HUD reports that it did not explicitly point out specific deficiencies, but utilized a question and answer approach designed to disclose ambiguities, uncertainties, or deficiencies while avoiding the disclosure of approaches or ideas through which other proposals had attained higher evaluations.

The parties agree that HUD did pose three general questions to Portfolio. The questions concerned Portfolio's experience in contracts of this kind, Portfolio's training experience, and the personnel Portfolio proposed to use in the performance of the contract. Portfolio contends, however, that such questions could have been answered in 5 minutes and asserts that:

"[i]f * * * [deficiencies] are pointed out so subtly as to be unrecognizable as problem areas with the proposal or approach, * * * the entire reason for the orals is negated."

When an agency conducts competitive range discussions, it must make those discussions meaningful. Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; 51 Comp. Gen. 621 (1972). In most cases meaningful discussions require the pointing out of proposal deficiencies or

weaknesses. Dynalectron Corporation, 55 Comp. Gen. 859 (1976), 76-1 CPD 167; 50 Comp. Gen. 117 (1970). Deficiencies, however, need not be pointed out in every case, and in fact should not be when to do so could result in technical "transfusion" (disclosure of one offeror's innovative solution to a problem) or technical "leveling" (helping one offeror bring his inadequate proposal up to the level of adequate proposals by pointing out weaknesses resulting from lack of diligence or competence). 52 Comp. Gen. 870 (1973); 51 id. 621, supra. In those cases, questions or requests that an offeror amplify upon or clarify particular aspects of its proposal have been regarded as sufficient to constitute meaningful negotiations, see Air Research Manufacturing Company of Arizona, 56 Comp. Gen. 989 (1977), 77-2 CPD 229; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404, affirmed June 16, 1976, 76-1 CPD 380, and such requests for clarification have in fact alerted offerors to weaknesses in their proposals and to the need for submission of revised proposals. See, e.g., Programming Methods, GTE Information Systems, Inc., B-181845, December 12, 1974, 74-2 CPD 331.

Whether the facts and circumstances of a given case warrant the explicit pointing out of deficiencies is a matter of judgment primarily for determination by the agency involved, and that determination is not subject to question unless it is clearly without a reasonable basis. Food Science Associates, Inc., B-183054, April 30, 1975, 75-1 CPD 269; B-173677, March 31, 1972 (summarized in 51 Comp. Gen. 621, supra). Here the record does not establish that HUD's discussion approach was unreasonable. It indicates only that HUD and the protester disagree as to the value or meaningfulness of what transpired. Exactly what transpired is not reflected by the record. Such a record does not provide a sufficient basis for us to conclude that meaningful discussions were not held. We point out, however, that we believe HUD could have reasonably concluded that pointing out at least some of its explicit concerns regarding the deficiencies in Portfolio's proposal could have led to technical leveling or, in the words of HUD's Procurement Regulations, to "major changes to the proposal." 24 C.F.R. 3.805-2(f) (1978). In short, we are unable to sustain the protest on the basis of this final contention.

In addition to raising the protest issues, Portfolio questions HUD's actions at the informal conference held pursuant to our Bid Protest Procedures. See 4 C.F.R. 20.7 (1978). Portfolio's principal concern is that while HUD's attorney and the contracting officer actively participated in the conference, two members of the TEP attended but remained silent throughout the conference.

The informal conference provided for by our Procedures is intended to allow protesters, as well as other interested parties, to offer oral argument in support of their respective positions. No party, however, is obligated to speak or answer questions at the conference and ultimately our decisions are based on the written record rather than any oral presentation. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 387 (1975), 75-2 CPD 232, where the protester took the position that by declining to respond orally at the conference, the agency "'lost its claim to credibility and clearly showed that its position on the issues is without merit.'" We disagreed, stating that:

"* * * while a bid protest conference may be useful in fostering a discussion among the parties which helps to illuminate the issues, it is not intended to be a full-scale adversary proceeding with sworn testimony and examination of witnesses. In fact, our Office has specifically rejected the adoption of such a procedure. See 43 Comp. Gen. 257, 263 (1963)." 55 Comp. Gen. at 388.

Consequently, we draw no conclusions from the failure of two HUD personnel to speak at the conference.

For the foregoing reasons, both the protest and the claim for proposal preparation costs are denied. See Documentation Associates, B-190238, June 15, 1978, 78-1 CPD 437. Protest expenses are unallowable in any event. Kent Uniform Company, Inc., B-188931, July 25, 1977, 77-2 CPD 46.


Deputy Comptroller General
of the United States